104

(1)

Supreme Court, U.S.
FILED

No. _____

08 - 141 AUG 4 - 2008

OFFICE OF THE CLERK

In The
Supreme Court of the United States

PHILIP F. GEORGE, JR.,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Mary Jane McFadden
Counsel of Record
MCFADDEN WINNER SAVAGE & SEGERMAN
175 South Third Street, Suite 350
Columbus, Ohio 43215
(614) 221-8868

Counsel for Petitioner

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

When government agents violate the Fourth Amendment's prohibition against general warrants by seizing Sixth-Amendment-protected communications between a defendant and his counsel that discuss the defendant's strategy, what is the appropriate remedy?

PARTIES TO THE PROCEEDING

There are no parties other than those named in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

I. Ohio's Courts Failed To Follow Relevant Decisions Of This Court Concerning The Sixth Amendment Right To Counsel 13

II. Ohio's Courts Ignored Relevant Decisions Of This Court Enforcing The Fourth Amendment's Prohibition Against General Warrants 17

III. Decisions of Federal Courts, And Courts In Other States, Conflict With Those Of Ohio's Courts On The Question Presented By This Petition.....18

CONCLUSION.....23

APPENDIX

Entry of
The Supreme Court of Ohio
Denying Jurisdiction to Hear the Case
and Dismissing Appeal
entered May 7, 2008.....1a

Judgment Entry of
The Court of Appeals for
The First Appellate District of Ohio,
Hamilton County, Ohio,
Affirming Decision of Trial Court
entered December 19, 2007.....2a

Judgment Entry of
Conviction and Sentence of
Hamilton County, Ohio,
Court of Common Pleas
entered March 1, 2006.....11a

Decision of
Hamilton County, Ohio,
Court of Common Pleas
Re: Motion to Dismiss Indictment
entered December 15, 2005.....13a

Memorandum Opinion of
The United States District Court for
The Northern District of Ohio
Eastern Division,
Ordering Return of Seized Property,
With Attachment,
entered June 28, 2004 .....29a

Attachment:

Attachment B
Items To Be Seized
undated.....42a

Opinion of
The Court of Appeals for
The First Appellate District of Ohio,
Hamilton County, Ohio,
Reversing First Conviction and
Remanding Case for Further Proceedings
entered June 4, 2004 .....49a

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Hicks,
480 U.S. 321, 107 S. Ct. 1149 (1987) 18

Barber v. Municipal Court,
24 Cal.3d 742, 598 P.2d 818,
157 Cal.Rptr. 658 (1979) 21

Graddick v. State,
408 So.2d 533 (Alabama, 1981) 21

Heck v. Humphrey,
512 U.S. 477, 114 S. Ct. 2364 (1994) 15

Maine v. Moulton,
474 U.S. 159, 106 S. Ct. 477 (1985) 15, 16

New Jersey v. Sugar,
84 N.J. 1, 417 A.2d 474 (1980) 21

Stanford v. Texas,
379 U.S. 476, 85 S. Ct. 506 (1965) 17, 18

State v. Cory,
62 Wash.2d 371, 382 P.2d 1019 (1963) 22

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052 (1984) 17

United States v. Cronic,
466 U.S. 648, 104 S. Ct. 2039 (1984) 17

United States v. Horn,
811 F. Supp. 739 (1992), *rev'd in part*,
29 F.3d 754 (1994) 19, 20

United States v. Levy,
577 F.2d 200 (1978) 18, 19, 20, 21

United States v. Marshank,
777 F. Supp. 1507 (N.D. Cal. 1991) 19, 20

United States v. Morrison,
449 U.S. 361, 101 S. Ct. 665 (1981) .....*passim*

United States v. Orman,
417 F. Supp. 1126 (D. Colorado, 1976) 19, 20

United States v. Peters,
468 F. Supp. 364 (S.D. Florida, 1979) 18

Weatherford v. Bursey,
429 U.S. 545, 97 S. Ct. 837 (1977) .....*passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV .....*passim*

U.S. CONST. amend. VI .....*passim*

U.S. CONST. amend. XIV § 1 2

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1983 13

Ohio Rev. Code § 1315.55(A)(1) 12

Ohio Rev. Code § 1315.55(A)(3) 12

RULES

FED. R. CRIM. P. 41(f)(1)(B) 5

FED. R. CRIM. P. 41(g) 5

OPINIONS BELOW

The Supreme Court of Ohio declined to hear this case without issuing an opinion. *State v. George*, Case No. 2008-0124, May 7, 2008, Case Announcements, 2008-Ohio-2028. App. 1a. The Court of Appeals for The First Appellate District of Ohio issued an unpublished judgment entry that articulated its grounds for affirming the trial court's decision. "Judgment Entry", *State v. George*, Case No. C-060293, First Appellate District of Ohio, Hamilton County, Ohio, December 19, 2007. App. 2a-10a. The trial court issued an unpublished, written decision finding that a Sixth Amendment violation had occurred, but overruled Petitioner's motion to dismiss the indictment. "Decision Re: Motion to Dismiss", Case No. B-01-07787, Court of Common Pleas of Hamilton County, Ohio, December 15, 2005. App. 13a-28a.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio declined jurisdiction on May 7, 2008. App. 1a. Jurisdiction to review this petition is conferred by 28 U.S.C. § 1257. This petition is being filed within ninety (90) days of the date of the decision of the Supreme Court of Ohio.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. XIV, Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Philip F. George, Jr., was indicted in Hamilton County, Ohio (Cincinnati) on eleven gambling and gambling-related charges in October of 2001. The case was investigated by agents of the Ohio Department of Public Safety, a state-wide law enforcement agency. George resides in Summit County, Ohio (Akron), about 225 miles from Cincinnati. George retained Cincinnati-based counsel to represent him. George kept in his home letters that his lawyer mailed to him advising him about his case.

On February 10, 2002, post-indictment, Ohio Department of Public Safety agents executed a search warrant at George's home. The agent working with the Cincinnati-based prosecutor in the pending case was the affiant who obtained the warrant. That agent also participated in the search. When the search commenced, George was concerned that the searching officials would read and/or seize his communications with his counsel. He summoned an Akron lawyer to come to his home. Upon arriving, the lawyer learned that George was under indictment in Cincinnati. He reviewed the warrant to determine if it authorized the seizure of communications between George and his counsel. It did not. He objected to the agents seizing the

defense's communications. The agents seized them over his objections.

After the search, George's Akron lawyer contacted a special prosecutor whose name had been provided to him by the agents. That prosecutor arranged for a box containing defense communications to be returned. No explanation of who had reviewed the documents that had been returned, or whether any copies had been made, was provided. The defense filed a motion to dismiss the pending indictment. George kept the box of returned documents, with its contents intact, in his home, with the intention of using it as evidence when his motion to dismiss was heard.

In September of 2002, George was indicted by the State of Ohio in Lorain County, Ohio (Elyria), on gambling charges virtually identical to the charges pending in Hamilton County. The Ohio Department of Public Safety was the investigative agency in the Lorain County case. George retained additional counsel. George's lawyers exchanged memoranda discussing defense strategy in both cases based upon information provided to them, in confidence, by George. Copies of these memoranda were mailed to George's home where George kept them among his private papers.

The Hamilton County prosecutor did not file a response to the motion to dismiss. Instead, on December 20, 2002, shortly before the motion was scheduled to be heard, Ohio Department of Public Safety Agents, Lorain County sheriff deputies, and Internal Revenue Service agents entered George's

home, pursuant to a federal warrant, and took the evidence of what had been seized in the earlier search. They also seized all of George's subsequent communications with his counsel that discussed the defense's strategy. The same agent who was working with the Cincinnati-based prosecutor, and who had obtained the first search warrant, participated in the second search. He acted as one of two affiants in obtaining the federal warrant. (The other was an Internal Revenue Service agent.)

When the second search commenced, George summoned the same lawyer who had represented him at the first search. The lawyer reviewed the warrant. It did not list defense communications as things that could be seized. He again objected. This time, he was ordered from the premises and prevented from observing what the agents were doing. He returned with George before the search concluded, but the agents would not permit George, or his counsel, to inspect the items being seized to verify the search inventory as required by Fed. R. Crim. Pr. 41(f)(1)(B). The list of seized items on the search inventory form left by the agents was so cryptic that it could not be used to prove that the agents had taken defense communications.

After the agents left, George and his counsel could see that all of George's communications with his counsel concerning the pending indictments were gone. George filed a motion for return of property with the federal court that had issued the search warrant pursuant to Fed. R. Crim. Pr. 41(g). He also supplemented his motion to dismiss that had been filed after the first search in Hamilton County. He

moved for a continuance of the imminent hearing on that motion to allow time for the federal court to order the return of his hearing evidence. Although defense counsel introduced her file copy of one of the seized memoranda as evidence for the trial judge's in camera review, and the defendant testified that his copy of that memorandum was missing when the second search concluded, the trial court denied George's motion for a continuance, and his motion to dismiss.

George also filed a motion to dismiss the Lorain County, Ohio indictment. That motion remains unresolved pending the outcome of this appeal.

George was tried in February of 2003. He was convicted on eight counts and acquitted on three. He appealed on multiple grounds, including that the trial court had erred by denying his motion to dismiss because dismissal was the only effective remedy for the state's violations of his Fourth and Sixth Amendment privacy rights. In June of 2004, the Court of Appeals For The First Appellate District of Ohio, Hamilton County, Ohio, in a 2-1 decision, reversed George's conviction and remanded the case solely on grounds that the trial court erred by denying George's motion for a continuance of the hearing on his motion to dismiss. It did not reach the merits of George's dismissal motion because the actual papers that had been seized were not part of the record. Opinion, *State v. George*, Case No. C-030216, First Appellate District of Ohio, Hamilton County, Ohio, June 4, 2004, 2004-Ohio-2868, not reported in N.E.2d, App. 49a-73a; jurisdiction

denied, 103 Ohio St.3d 1525, 2004-Ohio-5852, 817 N.E.2d 408.

After the court of appeals reversed George's conviction, the federal court granted his motion for return of property. *In re: Matter of Searches of 326 Oak Crest, Copley Twp., OH and 316 Boyle Street, Akron, OH*, U.S. Dist. Ct., N.D. Ohio, E. Div., Case No. 5:02 MC 120, Memorandum Opinion, June 28, 2004. App. 29a-48a. Counsel agreed that the Office of the United States Attorney for the Northern District of Ohio could comply with the federal court's order by mailing the seized materials, via certified mail, directly to the Hamilton County trial court in Cincinnati.

A post-remand hearing on the motion to dismiss was held in December of 2005. The state did not establish a chain of custody for George's Sixth-Amendment-protected communications while they were in the government's possession. The state contended that, because the warrants authorized the seizure of some documents, and the agents were concerned about protecting George's rights, they had placed all "potentially privileged" documents into sealed containers for later review by a neutral prosecutor behind a "Chinese wall", and did not read them. The state presented no evidence that a "Chinese wall" was put in place after the first search. The written plan for the second search instructed the executing agents to seize items only if they were specifically listed in the warrant. It made no mention of the "Chinese wall" procedure described by the state at the hearing.

On direct examination by the prosecution, agents who participated in both searches denied reading the defense's communications, or discussing them with the prosecutor in George's case. When asked on cross-examination about details of what happened to the seized defense communications while they were in the government's possession, all of the agents who testified obfuscated or experienced failures of recollection. The agent who returned the box containing defense communications after the first search could not explain how they could have been segregated from the other documents that were seized without reading them.

The prosecutor in George's case testified that he had no contact with the seized defense communications and did not direct the agents to seize them. He claimed that he never discussed the searches with the agent with whom he was working, even after he was served with George's pleadings informing him of the illegal seizures. Having stated that he did not discuss the searches with the agent with whom he was working, he was forced to admit that he did not ask that agent about the sources of the information that the agent provided. Ultimately, he acknowledged that he could have used information derived from the illegally-seized defense communications without knowing its source.

A deputy sheriff, who served as the inventory officer at the second search, testified that all of the materials seized from the George home went directly to the Internal Revenue Service office in Akron. This testimony was given four years after the second search. It was contradicted by a chain-of-custody

receipt that the same deputy filled out and signed on the day of the search. That form shows that she surrendered everything listed on the search inventory to an Ohio official after the search concluded.

An Assistant United States Attorney comprised the government's "Chinese wall" after the second search. She admitted that she was not asked to serve as a "Chinese wall" until after George filed his motion for return of property. She also admitted that she had no personal knowledge of where the seized materials had been between the time of the second search and the time that they were surrendered to her several weeks later.

A box of seized materials forwarded by the Office of the United States Attorney for the Northern District of Ohio to the trial court was marked as an exhibit. Defense counsel requested that the trial court review its contents in camera. It contains George's copy of the strategy memorandum that defense counsel had offered as evidence of what had been seized prior to the first trial, and other sensitive defense communications. The agent working with the prosecutor could have used these documents prior to the first trial to learn details about the defense's strategy, and to anticipate cross-examination questions asked of him when he appeared as a witness.

Both search warrants were introduced as evidence. They did not list defense communications as "things to be seized". U.S. Const. amend. IV. The agents who executed the warrants testified that

they knew that George was under indictment at the time of both searches. One agent even admitted on cross-examination that he knew that no judge would permit the seizure of an indicted defendant's communications with his counsel.

The Akron lawyer that George called to the scene of both searches testified that he was willing and able, during both searches, to segregate George's Sixth-Amendment-protected materials into a box or other container, and transport them, in the company of an agent, for an in camera review by the judges who issued the warrants for a determination of whether they could be lawfully seized. But the agents executing the warrants would not discuss alternatives to outright seizure. They made no mention of a "Chinese wall" procedure during the searches. George's lawyer saw an agent reviewing letters on the letterhead of defense counsel during the first search. He observed that papers were scattered about and left behind in the George home after the second search, including a letter from a lawyer relating to a civil matter. This testimony belied the state's contention that its agents had sealed all "potentially privileged" documents for later review and did not read them.

George testified that, after the first search, he accepted his counsel's assurances that the courts would protect the privacy of his communications with them. But, after the second search, he did not, and chose instead to minimize what he told his counsel. He testified that the assurances provided by the government at the hearing did nothing to reassure him. He had seen an agent reading his

communications with his counsel when the searches were being conducted. The same agent testified under oath at the hearing that he had not done so. George chose to believe his eyes and not his adversaries.

George's trial counsel stated, on the record, that she could not represent her client effectively at any re-trial because of George's reluctance to confide in her.

The trial court decided that George's Sixth Amendment right to counsel had been violated. But it denied George's motion to dismiss, finding that a re-trial was the appropriate remedy. It then found that the court of appeals had already granted that remedy by reversing George's conviction, even if it did not realize what it was doing when it rendered its earlier decision. App. 13a-28a. Even though defense counsel had read the Fourth Amendment verbatim in open court as part of her argument, the trial court found that "neither prosecution or [sic] defense, objects to the seizure of the items in question". App. 14a. The trial court failed to mention that the primary reason that Sixth Amendment privacy exists is to encourage defendants to communicate with defense counsel. It focused exclusively on George's inability to prove affirmatively that the state had used the illegally-seized defense communications to help its case.

George was tried again. He did not testify. His counsel could not prepare him to testify, or provide informed advice as to whether he should testify. To do so, she needed information from

George concerning what he would say if he testified. He was not communicating that information to her. (George did not testify at the first trial either.)

George was convicted of two counts of felony money laundering in violation of Ohio Revised Code §§ 1315.55(A)(1) and 1315.55(A)(3), sentenced to two one-year terms to run concurrently, and credited with 425 days of time served prior to the reversal of his first conviction. "Judgment Entry: Sentence: Incarceration", filed March 1, 2006. App. 11a-12a. George appealed on the same interrelated Fourth and Sixth Amendment grounds he had advocated to the trial court, that are advanced in this Petition, and that he has argued at every stage of this case, including in his motion made to the federal court for the return of his property after the second search. On appeal, the state did not contest the trial court's finding that George's Sixth Amendment right to counsel had been violated. It argued only that, because the prosecutor did not have contact with the illegally-seized defense communications, re-trial was the appropriate remedy.

On December 19, 2007, in a "Judgment Entry", authored by the judge who had dissented in his previous appeal, the intermediate Ohio appellate court affirmed the trial court's decision. App. 2a-10a.

George appealed to the Ohio Supreme Court. On May 7, 2008, that Court declined to exercise jurisdiction, without opinion. App. 1a.

REASONS FOR GRANTING THE WRIT

I. Ohio's Courts Failed To Follow Relevant Decisions Of This Court Concerning The Sixth Amendment Right To Counsel.

Both the trial court and the intermediate Ohio appellate court cited this Court's decision in *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837 (1977), as a basis for determining that a re-trial was the appropriate remedy for the state's undisputed Sixth Amendment violation. App. 2a-10a, at 4a, and App. 13a-28a, at 16a (mistakenly referred to by trial court as "Waterford"). *Weatherford* was a civil case, brought under 28 U.S.C. § 1983. An undercover government agent was sued for attending two meetings with a defendant and his counsel without revealing his true identity. This Court found that the agent did not violate the defendant's Sixth Amendment right to counsel. He was invited to the meetings, and legitimately believed that he could not decline the defense's invitations without compromising an ongoing investigation. This Court observed that defendants can "exclud[e] third parties from defense meetings . . . ." 429 U.S. 545, at 554, 97 S. Ct. 837, at 843. In contrast, George and his counsel were powerless to prevent the repeated, unconstitutional intrusions of the state into their private communications.

Ohio's intermediate appellate court cited this Court's decision in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665 (1981), in affirming the trial court's remedy of a re-trial. App. 2a-10a, at 8a. In *Morrison*, federal agents met with an indicted

defendant outside of the presence of her counsel. While expressly disapproving of their attempt to interfere with counsel's function, this Court found dismissal inappropriate because the agents were totally unsuccessful. Any prejudice to defense counsel's effectiveness was completely negated by the defendant's testimony in *Morrison* that her relationship with her counsel was not affected by the agents' conduct, and that she disclosed no information to the agents. In this case, the state's agents succeeded in impairing defense counsel's effectiveness and in obtaining information about George's defense strategy. The trial court's "remedy" of a re-trial did nothing to restore defense counsel's effectiveness. Neither did it assure that the state's case at re-trial would be free of constitutional taint. By stressing the "absen[ce of] demonstrable prejudice, or substantial threat thereof" in *Morrison*, this Court tried to make it clear that it was not requiring defendants affirmatively to prove trial prejudice when state agents successfully interfere with the right to counsel. 449 U.S. at 365, 101 S. Ct. at 668. Remedies for Sixth Amendment violations should "neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* Because no remedy short of dismissal can accomplish those ends in this case, dismissal is required.

Ohio's courts required George to prove that the state's agents had acquired knowledge of the contents of the illegally-seized defense communications, and that they used that knowledge to further the state's case, as a precondition to

dismissal. The only means available to George for proving the knowledge of the state's agents was to elicit admissions from them. George had no hope of proving what knowledge existed in the minds of his adversaries. The state's agents could falsely deny having knowledge of the contents of the illegally-seized defense communications without any fear of prosecution for perjury. Moreover, the agents in this case had a motive to convict George beyond that which normally exists in a criminal case. The illegally-seized communications were now available to George as evidence; George would be barred from suing the agents for their now provable Fourth and Sixth Amendment violations if he was convicted. *See*, *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). By requiring George to depend on the veracity of his adversaries to obtain the only effective remedy for the Sixth Amendment violations of those adversaries, Ohio's courts deprived George of his right to counsel.

After *Weatherford* and *Morrison*, *supra*, this Court decided *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477 (1985), a case where a government operative was directed to meet with an indicted defendant outside of the presence of his counsel to obtain incriminating statements. The operative succeeded in inducing the defendant to make damaging admissions. This Court sustained the lower court's order suppressing the wrongfully obtained statements, and reiterated what it thought its previous decisions had already made clear: that is, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection

afforded by the right to counsel". 474 U.S. *at* 171, 106 S. Ct. at 484. This case represents a particularly egregious failure to meet that obligation, not just by the law enforcement agents investigating George, but by the prosecutor as well.

After George's motion to dismiss was filed after the first search, the prosecutor did nothing to ascertain whether the agent with whom he was working had been involved. Had he done so, the second seizure of defense communications might have been prevented. Even after he was served with George's pleadings, filed after the second search, which informed him that agents of the Ohio Department of Public Safety had, once again, illegally seized communications between the defendant and his counsel, the prosecutor made no effort to determine the sources of information being provided to him. Incredibly, his obvious effort to retain plausible deniability about reading the illegally-seized defense communications, while leaving the door wide open to learn about their content, was lauded by the trial court as "admirably segregate[ing] himself from any access to the privileged documents". App. 22a. The investigative agents, the prosecutor, and Ohio's courts, all failed to understand what this Court meant by the phrase "affirmative obligation". 474 U.S. at 171, 106 S. Ct. at 484.

Even guilty defendants who plea bargain and never consider going to trial are entitled to the informed advice of counsel. This Court does not impose a burden on defendants to prove trial prejudice when courts or law enforcement officials

successfully interfere with defense counsel's function or deny the right to counsel (as opposed to cases where ineffective assistance claims are predicated upon defense counsel's performance). "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [Citation omitted.] ... [Such] impairments ... are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984) (quotation based upon reasoning in companion case of *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984), and cases cited at n. 25 therein).

II. Ohio's Courts Ignored Relevant Decisions Of This Court Enforcing The Fourth Amendment's Prohibition Against General Warrants.

The criminal defendants in both *Weatherford* and *Morrison*, *supra*, were free to decide whether their communications with their lawyers would be disclosed to third parties. George was deprived not only of that freedom, but also of the Fourth Amendment's explicit protection against general warrants. In *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506 (1965), this Court directed the lower courts to enforce the terms of search warrants with "scrupulous exactitude" when law enforcement officials chill the exercise of another constitutional right by seizing items not listed in their warrant because of the "precise and clear" language of the Fourth Amendment. 379 U.S. at 485, 481, 85 S. Ct.

at 511, 509. Ohio's courts ignored not only *Stanford*, but also *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149 (1987), and all of George's evidence proving that the state's agents had deliberately violated the Fourth Amendment's prohibition against general warrants. By doing so, they confirmed George's belief that he enjoyed no zone of privacy where he could hold communications with his counsel free from state intrusion.

III. Decisions of Federal Courts, And Courts In Other States, Conflict With Those Of Ohio's Courts On The Question Presented By This Petition.

Other courts have considered the question presented by this petition. Those courts have all recognized the continuing nature of the damage caused when the government unlawfully intrudes on defense communications and successfully gains access to information about a defendant's strategy. They have all found dismissal the necessary remedy. In *United States v. Peters*, 468 F. Supp. 364 (S.D. Florida, 1979), FBI agents seized a tape-recorded telephone message without a warrant. The message contained advice from the defendant's counsel concerning possible strategies in the defendant's case. Although the agents in *Peters*, unlike the agents in this case, did not know that they were seizing a defense communication when they seized the tape, the court found dismissal to be "the only viable solution" relying upon the Third Circuit's decision in *United States v. Levy*, 577 F.2d 200 (1978). 468 F. Supp. at 366.

In *Levy*, law enforcement officials arranged for a government agent to be indicted. He shared an attorney with a co-defendant and, through him, the government learned of the defense's strategy. In dismissing the indictment, the court reasoned that, when the government deliberately breaches the privacy surrounding defense communications, and succeeds in gaining access to details of a defendant's strategy, that it so "disturb[s] the balance implicit in the adversary system" that dismissal is required. 577 F.2d at 209. The *Levy* court did not read this Court's decision in *Weatherford*, *supra*, as allowing it to weigh the amount of prejudice to the defendant caused by the government's violation of defense privacy against the government's interest in proceeding, as Ohio's courts did in this case. *Id.*

Other federal courts have deemed dismissal to be the appropriate remedy in cases where the government successfully intruded on defense communications concerning strategy and the government failed to prove that the damage to defense counsel's function could be contained by a lesser remedy. *See, United States v. Marshank*, 777 F. Supp. 1507, 1524 and 1529-30 (N.D. Cal. 1991) (court exercised supervisory powers to dismiss indictment when government collaborated with defendant's attorney to build case against defendant) and *United States v. Orman*, 417 F. Supp. 1126, 1131-1132 (D. Colorado, 1976) (court found "no alternative to dismissal" as remedy for violation of defendant's Sixth Amendment rights).

Ohio's courts relied upon *United States v. Horn*, 811 F. Supp. 739 (1992), in deciding that

dismissal was not required. App. 2a-10a, at 7a, and 13a-28a, at 25a-27a. *Horn* did not involve governmental intrusion into communications between a defendant and his counsel. In *Horn*, a prosecutor gained insight into defense counsel's trial strategy by surreptitiously arranging to review documents that defense counsel selected for copying from among thousands of seized documents stored in a government warehouse. The court in *Horn* described the facts before it as "very serious", but not "outrageous" like the facts in *Levy*, *Marshank and Orman*, cases which it expressly distinguished. 811 F. Supp. at 751. The trial court in this case inaccurately cited *Horn* for the proposition that it could deny a motion to dismiss for a proven Sixth Amendment violation merely by announcing that it did not deem the Sixth Amendment violation to be "outrageous". App. 13a-28a, at 27a. But the *Horn* court, consistent with this Court's decision in *Morrison*, *supra*, found that it could tailor remedies, short of dismissal, that affirmatively assured the defendant "the effective assistance of counsel and a fair trial". 811 F. Supp. at 752. It did not impose a burden on the defendant to prove what the government had done with the information that it had unlawfully obtained before granting an effective remedy, or ignore defense counsel's function.[1]

---

[1] On appeal, the First Circuit reversed only one of the trial court's multiple remedies, the award of attorney's fees against the United States. Even though it found that the government had committed "egregious acts of prosecutorial misconduct", the First Circuit found that the trial court lacked jurisdiction to award attorney's fees against the United States because of the doctrine of sovereign immunity. *United States v. Horn*, 29 F.3d 754, 770 (1994).

The years of trouble and expense that George has incurred in his effort to enforce his right to counsel will cause other defendants to conclude that it is less expensive not to confide in counsel than to try to establish a right to do so privately. If this Court does not speak firmly on the question presented by this petition, Ohio defendants will have to decide between 1) confiding in their lawyers and risking assisting the state's case, and 2) not confiding in their lawyers and risking a lack of informed legal advice. Why should they have to make this choice?

The Court of Appeals of Alabama, in a case involving governmental eavesdropping on defense communications, observed that "[t]here exists a paucity of judicial treatment [concerning the remedy for] this particular type of Sixth Amendment violation". It dismissed an indictment, applying this Court's reasoning in *Weatherford*, *supra*, differently than Ohio's courts. *Graddick v. State*, 408 So.2d 533, 546 (Alabama, 1981).

The Supreme Court of California, in a case with a fact pattern similar to *Levy*, *supra*, dismissed an indictment. It noted that the defendants' reluctance to cooperate fully with their attorney was an important fact distinguishing the case before it from this Court's decision in *Weatherford*. *Barber v. Municipal Court*, 24 Cal.3d 742, 755, 598 P.2d 818, 825, 157 Cal.Rptr. 658, 665 (1979). *See also*, *New Jersey v. Sugar*, 84 N.J. 1, 21-22, 417 A.2d 474, 484-485 (1980) (New Jersey Supreme Court declined to dismiss indictment, but only because the evidence showed that the defendant's ability to work in

confidence with his attorney had not been impaired, and no defense strategy was contained in the statements obtained by the state.)

In *State v. Cory*, 62 Wash.2d 371, 377, 382 P.2d 1019, 1022 (1963), the Supreme Court of the State of Washington found that there was "no way to isolate the prejudice" to the defendant's right to counsel caused by the state's eavesdropping activity. It dismissed the indictment, even though the defendant had only requested that his conviction be reversed, observing that

> [i]f the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

62 Wash.2d at 377, 382 P.2d at 1023. This case illustrates the prescience of that statement. When the trial court failed to act promptly on George's motion to dismiss filed after the first illegal seizure, Ohio's agents did not even wait until the next case to repeat their unconstitutional conduct.

CONCLUSION

In most criminal cases, and almost always in cases where a court appoints counsel, defense lawyers meet their clients for the first time after charges are filed. Persuading a complete stranger to confide sensitive information is one of the most difficult tasks faced by defense counsel. Defendants will not confide in their counsel if the state can illegally seize defense communications without risking dismissal. Defense counsel must have the ability to assure their clients that the courts will protect the privacy of their confidences. If this Court does not reverse the decision of Ohio's courts, future defendants will not receive informed legal advice, and decisions will be made by courts and juries without the benefit of important information that can only be communicated to them through counsel.

This Court's answer to the important constitutional question presented by this petition is especially needed in Ohio. Philip F. George, Jr. respectfully requests that this Court grant a writ of certiorari and hear this case.

Respectfully submitted,

/s/ Mary Jane McFadden
MARY JANE MCFADDEN
McFadden Winner Savage & Segerman
175 South Third Street, Suite 350
Columbus, Ohio 43215-5188
614.221.8868

Counsel of Record for Petitioner

Entered May 7, 2008

THE SUPREME COURT OF OHIO

State of Ohio — Case No. 2008-0124

v. — ENTRY

Philip F. George

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C060293)

/s/Thomas J. Moyer
Thomas J. Moyer
Chief Justice

Entered December 19, 2007

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-060293
Plaintiff-Appellee,	:	TRIAL NO. B-0107787(B)
vs.	:	
PHILIP F. GEORGE	:	*JUDGMENT ENTRY*
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Defendant-appellant Philip F. George appeals his convictions, following a second trial before the court, for two counts of money laundering in violation of R.C. 1315.55(A)(1) and 1315.55(A)(3). The trial court found George not guilty of the remaining gambling-related charges. The trial court sentenced George to a one-year term of imprisonment for each of the money-laundering counts, to be served concurrently, and gave George credit for time served. George now appeals, raising a sole assignment of error in which he challenges the trial court's refusal, following this court's remand in his prior appeal, to dismiss the indictment against

---

[1] See S. Ct. R. Rep. Op. 3(A), App. R. 11.1(E), and Loc. R. 12.

him for violation of his Sixth Amendment right to counsel.

In his prior appeal,[2] George had argued that the trial court had erred in failing to dismiss the state's indictment against him, where "state agents [had] violated his [Sixth Amendment] right to counsel by unlawfully seizing attorney-client communications" during two separate searches of his home in February 2002 and December 2002.[3] But neither George nor the state had included any of the allegedly privileged materials seized in the December 2002 search in the record on appeal.[4] Consequently, we concluded that, in the absence of those documents, we could not determine whether George's constitutional rights had been violated.[5] We, therefore, remanded his case to the trial court for a new trial and for consideration of his motion to dismiss the indictment against him in light of the Ohio Supreme Court's decision in *State v. Milligan*.[6]

Following our remand, the parties arranged for the disputed materials, which had been seized by state and federal agents during the second post-indictment search of George's home and had remained in the possession of a federal prosecutor, to be transferred to the trial court. The trial court then

---

[2] 1st Dist. No. C-030216, 2004-Ohio-2868

[3] Id. at ¶14-¶16 and ¶26.

[4] Id. at ¶30¶32.

[5] Id. at ¶32.

[6] Id. at ¶32 and ¶55-¶58. 2

reviewed the materials in camera and held an evidentiary hearing on George's motion to dismiss the indictment. During the hearing, the state presented testimony from Ohio Department of Public Safety Agents Aaron Reese and Harold Torrens, Jeffrey Gilker, an agent with the organized-crime division of the Hamilton County Sheriff's Office, and Assistant United States Attorneys Robert Bulford and Benita Pearson. George presented testimony from himself and two of his attorneys, Charles Quinn, who had been present during both searches of his home, and Robert Gutzwiller, as well as from Peter Kacarab, a special agent with the criminal division of the Internal Revenue Service, and Lieutenant Jennifer Limbert of the Summit County Sheriff's Office.

After listening to the testimony of the witnesses, and counsels' arguments, and reviewing the exhibits admitted at the hearing, the trial court issued a lengthy written decision in which it articulated the four factors set forth in the United States Supreme Court's decision in *Weatherford v. Bursey*,[7] as adopted by the Ohio Supreme Court in *State v. Milligan*,[8] and applied those factors to the evidence before it. The trial court concluded that while both searches had resulted in the seizure of confidential attorney-client information, the main thrust of which was trial strategy and not hard evidence, there was no evidence that the state and federal agents had acted deliberately to obtain this information, given their testimony that they were

---

[7] (1977), 429 U.S. 545, 97 S. Ct. 837.

[8] (1988), 40 Ohio St.3d 341, 533 N.E.2d 724.

never instructed to search for these materials and that they had not knowingly read any of the disputed materials or communicated any of their contents to the assistant Hamilton County prosecuting attorney. The trial court further noted that both searches had been conducted by governmental agencies other than Hamilton County, and that, in the case of the second search, the federal prosecuting attorney had adopted a procedure to segregate any potentially confidential documents and to preserve them behind a Chinese Wall until their status could be determined by the federal magistrate who had issued the search warrant.

The trial court also relied on the testimony of the assistant Hamilton County prosecuting attorney that he had not personally seen or read any of the documents containing the confidential information. The trial court held that while it was certainly possible that some government agents testifying in Hamilton County may have gleaned some information from the confidential documents, it was impossible to determine whether or to what extent that information had been used by the state in the prior trial. The trial court further found that the good-faith effort of the prosecuting attorneys to protect George's privileged information was certainly not the type of "outrageous conduct" that warranted dismissal of the charges. Consequently, it denied George's motion to dismiss the indictment.

The trial court concluded, however, that because a Sixth Amendment violation had occurred, a sanction was warranted in the form a new trial. The trial court then stated that because this court

had already ordered a new trial in George's prior appeal, no additional sanctions were warranted. A new trial was then held before the court, and the court found George guilty of the two counts of money laundering and sentenced him to time served.

In this appeal, George raises a sole assignment of error, in which he contends that the trial court erred in denying his motion to dismiss the indictment against him on Sixth Amendment grounds, "where the state's agents twice seized defense communications in violation of the terms of judicial warrants post-indictment, and the state failed to show that the seizures did not prejudice the defendant's right to counsel," and where "dismissal was the necessary and appropriate remedy."

George raises two main issues for our review. He first contends that the trial court failed to follow this court's instructions to apply the reasoning in *Milligan* and *Weatherford*. We disagree.

In *Milligan*, the Ohio Supreme Court addressed the state's interference with the attorney-client privilege, setting forth the procedure to determine if a Sixth Amendment violation had occurred and the appropriate relief.[9] In that case, jail authorities had secretly taped a telephone conversation between the defendant and his attorney.[10] The supreme court remanded the case for consideration of the four factors set forth in *Weatherford* and directed the trial court to

---

[9] *Milligan*, supra, at 344-345. 4

[10] Id. at 342.

determine if the unauthorized intrusion had resulted in substantial prejudice to the defendant and, if it had, to take the appropriate action, including dismissal, if necessary.[11] The court, further held that "* * * the burden is upon the state, after a prima facie showing of prejudice by the defendant, to demonstrate that the information gained was not prejudicial to the defendant."[12]

Here, the trial court, in a well-reasoned decision, reviewed all four factors set forth in *Milligan* in detail and applied those factors to the evidence before it. The trial court found that the state had demonstrated that the seizure of attorney-client communications by Ohio Department of Safety gents, IRS agents, and Lorain County authorities had not prejudiced George in his prior trial in Hamilton County. Consequently, George's first issue is meritless.

George next argues that the trial court erred in ordering a new trial. He contends that dismissal of the indictment was the only appropriate remedy for the state's violation of his Sixth Amendment rights. "But the current state of the decisional law on this subject does not permit dismissal except in situations where the government misconduct is found to be 'outrageous.' "[13]

---

[11] Id. at 345.

[12] Id

[13] *United States v. Horn* (D.N.H. 1992), 811 F.Supp. 739, 751.

For example, in *United States v. Morrison,* the Supreme Court addressed an unjustified invasion into the attorney-client relationship.[14] In that case, DEA agents who knew that the defendant, was represented by an attorney met, "with Morrison without defense counsel's knowledge or permission. The court of appeals held that the defendant's right to counsel had been violated, irrespective of the lack of proof of prejudice to her case. The Supreme Court said that even if there was prejudice, any action taken had to be "tailored to the injury suffered."[15] Since "respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings," there was "no justification" for such "drastic relief' as a dismissal with prejudice.[16]

Likewise, in *State v. Milligan,* the Ohio Supreme Court rejected an automatic dismissal rule, adopting instead, based on *Weatherford,* a case-by-case approach where a court must balance "the interest of the criminal defendant to engage in free and confidential discussion with his attorney and the interest of the state in ensuring that a prosecution not be jeopardized by the unauthorized acts of law enforcement officers, which result in no prejudice to the defendant."[17]

---

[14] (1981), 449 U.S. 361, 101 S. Ct. 665.

[15] Id. at 364.

[16] Id. at 366-67.

[17] *Milligan,* supra, at 344.

In this case, the trial court, after balancing the factors set forth in *Milligan*, held that dismissal of the indictment was not warranted, particularly where (1) the state had demonstrated that it had not deliberately sought the privileged materials in either search, (2) there was no evidence that the state had directly learned defense strategy or that it had directly gained any advantage from the seized materials, and (3) the defendant had not demonstrated that the state's conduct was "outrageous."[18]

The trial court noted the unique circumstances in this case, where both sides had already seen the presentation of each other's cases, and where George had been given ample time to revise his strategy accordingly. Thus, it concluded that "the fact that the prosecution, or some prosecution witnesses may have been aware of a strategy contemplated years ago before a trial long since held and reversed, has no relevance to the trial about to commence in January 2006."

Because the record and the applicable case law supports the trial court's remedy of a new trial, instead of an outright dismissal, George's second issue is feckless. Having, therefore, found no merit in either of George's arguments, we overrule his sole assignment of error and affirm the judgment of the court below.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the

---

[18] See *Horn*, supra; see, also *State v. Kimmel*, 3rd Dist. No. 9-03-53, 2004-Ohio-1207, at ¶12-¶18.

trial court under App. R. 27. Costs shall be taxed under App. R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 19, 2007 per order of the Court.

/s/
Presiding Judge

Entered March 1, 2006

THE STATE OF OHIO, HAMILTON COUNTY COURT OF COMMON PLEAS

date: 03/01/2006
code: GJFI
judge: 27

/s/ Thomas H Crush
Judge: Thomas H Crush

No. B-0107787-B

STATE OF OHIO
VS.
PHILLIP F. GEORGE JR.

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **MARY JANE MCFADDEN** on the 1st day of March 2006 for sentence.

The Court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

count 6: **MONEY LAUNDERING, 1315-55A1/ORCN,F3**

count 8: **MONEY LAUNDERING, 1315-55A3/ORCN,F3**

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 6: **CONFINEMENT: 1 Yrs**
DEPARTMENT OF CORRECTIONS

count 8: **CONFINEMENT: 1 Yrs**
DEPARTMENT OF CORRECTIONS

THE SENTENCES IN COUNTS #6 AND #8 ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER. THE DEFENDANT IS GIVEN CREDIT FOR FOUR HUNDRED TWENTY-FIVE (425) DAYS TIME SERVED.

Defendant was notified of the right to appeal as required by Crim. R. 32(A)(2)

Entered December 15, 2005

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	: CASE NO: B-01-07787
Plaintiff	:
	: DECISION RE: MOTION
-vs-	: TO DISMISS
	: INDICTMENT
PHILLIP F. GEORGE, JR.:	
Defendant.	:

Crush, J

This matter is again before the Court upon Motion filed on behalf of defendant Phillip F. George, Jr., upon Sixth Amendment grounds, to Dismiss the Indictment. The Court has presided over an evidentiary hearing involving two-and-a-half days of testimony, and heard the arguments of counsel.

It is apparent from the evidence, and undisputed by both counsel, that constitutionally protected materials were taken from the defendant's home upon the occasion of each search involved herein; specifically, on February 11, 2002, and on December 20, 2002. The prosecution attempts to justify the taking by contending that the documents and other matter seized could not at first glance be determined to be protected material, although the general appearance of the documents raised that possibility; that, in such circumstances, it was prudent and proper for the government to segregate the possibly protected material, without perusing it,

from other seized items; that it was proper for a government attorney, not working on the particular case, to inspect the segregated items to determine if there were protected materials, and, if so, to return them to the defendant; or, if it was not certain whether the materials were protected, to submit them to an impartial magistrate for such determination.

The defendant argues that the appropriate procedure was to segregate the materials on the spot; to place them in safekeeping with a court; and then to a have an impartial magistrate inspect the materials to determine whether they were protected or not.

It is clear, therefore, that neither prosecution or defense, objects to the seizure of the items in question, but that the defense objects to the method of seizure and the handling of the objects after their seizure. Defense points out that the chain of custody of the documents has not been established in complete detail, and that there was the opportunity, whether taken or not, for prosecution attorneys and witnesses to inspect the materials.

The prosecution asserts, and defendant does not dispute, that the prosecutor assigned for the trial of this case has scrupulously avoided contact with the materials in question and has not read their contents. In fact, the scrupulous avoidance of contact with the disputed material by both prosecution and defense counsel has caused considerable delay, and come confusion, in this matter.

The first and second searches were both pursuant to warrant. The first search was conducted by State authorities; the second by federal authorities; although both searches involved some of the same State agents. The first search was conducted without any prior planning with regard to possible privileged attorney-client documents; the second search was conducted with a plan in place for handling such documents. Counsel for the defendant was present, part of the time, at both searches. Documents seized in the first search, which were constitutionally protected, were returned within a few days to defense counsel. Documents seized in the second search, which were constitutionally protected, were held behind a so-called "Chinese Wall" and eventually offered to be returned to the defendant.

The prosecution witnesses have stated that they did not read the protected documents beyond the absolute minimum required to determine their possible status as protected documents. On the other hand, an attorney who formerly represented the defendant stated that he saw a State agent reading one of the protected documents at some length during the first search. The defendant testified that he saw an agent reading some protected documents at some length during the second search.

The defense claims that the prosecution used information from the protected documents in the first trial of this case. The only evidence of such alleged was the statement of defendant that a witness testified at trial that the witness gave money to the defendant, whereas on a protected tape

the same witness stated that be had given money to a charity.

The defendant argues that the prosecution should be sanctioned for the agents' seizure of protected materials by dismissal of all charges against the defendant. The criteria for determining this issue have been spelled out by the Court of Appeals, First Appellate District, in its reversal and remand of this case:

> "Both the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio guarantee a criminal defendant the right to counsel.... (A)n accused does not received effective assistance of counsel if he is denied private consultation with his counsel.
>
> "When examining government intrusion into the attorney-client privilege, we must strike a balance between the Sixth-Amendment interests of a criminal defendant and the state's interests in ensuring that a prosecution is not jeopardized by the unauthorized acts of overzealous officers, by applying the Waterford test. The test is applied on a case-by-case basis, analyzing the following four factors: (1) whether the government deliberately intruded in order to obtain confidential and privileged information; (2) whether the government obtained directly or indirectly any evidence that was or could have been used at trial as a result of the intrusion; (3) whether any information obtained was or could have been used in any manner

> detrimental to the defendant; and (4) whether details about trial preparation were learned by the government."

The criteria for sanctions delineated by the Court of Appeals are taken from State v. Milligan (1988), 44 Ohio St. 3d 341, 344, 533 N.E. 2d 724; which, in turn, followed Weatherford v. Bursey (1977), 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed. 2d 30.

The Court of Appeals also made the following comments:

> "...(T)his is an unusual case. Never before have we heard of a situation where state agents purposefully seized attorney-client communications twice in the same case...Surely if state agents were allowed to seize attorney-client communications at any time under the guise of another investigation, this right would be meaningless."

***

> "Because nobody has had access to the documents in the federal prosecutor's possession, we cannot say whether there was any privileged attorney-client information seized in December 2002. And we cannot say whether the prosecutor in this case had access to any of the supposedly confidential information. We cannot determine whether the motion to dismiss should have been granted or denied."

It is now evident, and not disputed, that confidential information was seized in both searches. It is undisputed that the Hamilton County prosecutor assigned to try this case has not personally seen or read any of the documents containing the confidential information.

The first criterion delineated by the Court of Appeals is "whether the government deliberately intruded in order to obtain confidential and privileged information."

The Court finds that there was no deliberate intrusion in order to obtain confidential and privileged information in the December search. This is evident because a procedure was adopted beforehand to segregate, without perusal, any materials even suspected of being confidential materials; and to preserve them behind a "Chinese Wall" until, if necessary, their privilege status was determined by a magistrate. Whether or not the procedure was perfectly followed, and whether or not the "Chinese Wall" was totally effective, the fact remains that it was clearly the intention of those planning the search to avoid obtaining confidential and privileged information.

With regard to the February search, there was no plan in place for the special handling of confidential materials. However, there is no evidence to indicate that the government deliberately intended the search process as an intrusion to obtain privileged documents. Thus, although there is some evidence that at least one agent perused one privileged document, the fact is that all privileged

documents were quickly returned to the defense, indicating that it had not been the prosecutor's intent to obtain privileged documents.

The second criterion is "whether the government obtained directly or indirectly any evidence that was or could have been used at trial as a result of the intrusion."

This question is complicated by the fact that the "government" involved in both searches was not the government involved in prosecuting this case, to-wit, Hamilton County. The governments involved in the first search were certain northern counties of this State and, arguably, the State of Ohio. The government involved in the second search was the federal government. The searches were conducted to acquire evidence for cases other than the one pending in Hamilton County. Thus, whether the governments involved in the search fortuitously obtained evidence that might be used at trial in Hamilton County does not reflect adversely upon Hamilton County's prosecution unless such evidence is shared with Hamilton County. It is undisputed that the Hamilton County prosecutor did not directly come into contact with any of the privileged documents. Thus, the only way that Hamilton County could obtain evidence from the searches in question arises from the possibility that some agent testifying in Hamilton County would have had read one or more of the privileged documents and could use information therefrom in his testimony here.

This Court has had access to and has read the privileged documents in dispute. The main thrust of

these documents is trial strategy and not hard evidence. It is obviously impossible for the Court to know whether any agent has read any of these, or shared their contents with any other witness; and equally impossible for the Court to know whether such information will be used at trial. It is at least interesting to note that this matter has been previously tried for a period of several weeks; and the defense has provided virtually no evidence that confidential information was used by the witnesses at trial.

Recently, one prosecution witness forwarded to the Hamilton County prosecutor, upon request for a list of witnesses, a copy of a letter from Benita Y. Pearson, Assistant United States Attorney, to Mary Jane McFadden. This letter (Def. Ex. 13) includes an attachment listing 62 items found by a magistrate to be privileged. Thus, it is clear that both the defense counsel and prosecutor in this matter know the list of seized confidential items, but the prosecutor has not seen their contents.

In summary, the government of Hamilton County, represented by the prosecutor, does not have directly have any evidence that was or could be used at trial as a result of the searches. Of course, certain witnesses may or may not have knowledge of this evidence; and, in this respect, the government might indirectly possess such evidence.

The third criterion is: "whether any information obtained was or could have been used in any manner detrimental to the defendant."

The situation here is similar to that discussed regarding the second criterion. Hamilton County, the prosecuting government entity, acting through the prosecutor, does not have information which has been or can be used in any manner detrimental to the defendant. However, witnesses may or may not have information gleaned from privileged documents that might or might not be used in a manner detrimental to the defendant.

The fourth criterion is: "Whether details about trial preparation were learned by the government."

Once again, no detail regarding trial preparation have been learned by the government of Hamilton County, represented by its prosecutor. However, witnesses mayor may not have information gleaned from privileged documents that might or might not reflect details regarding trial preparation.

In the instant matter, the searches in question were conducted by government agencies other than that which is prosecuting this action. The prosecutors, from other jurisdictions, who were responsible for the searches, showed an understanding of the privileged nature of attorney-client communications. The prosecutor in the first search unfortunately did not plan a procedure for handling suspected privileged materials, but promptly returned such materials when their true nature was demonstrated. The prosecutor in the second search made plans for handling materials suspected of being privileged, and followed the plan. There is some evidence that agents on the scene of the searches may have read more than a bare

minimum of some documents that were allegedly privileged. In any case, because the documents suspected of being privileged were retained in the custody of the prosecutors for at least some time, there is at least a theoretical possibility that the documents could have been viewed by prosecution attorneys and witnesses in the jurisdictions where the searches occurred. The Hamilton County prosecutor has admirably segregated himself from any access to the privileged documents. It is his need to use witnesses who may be tainted with knowledge of some of the privileged material which presents the problem here.

The problem must be solved by a process of weighing. The Court must consider the Sixth Amendment rights of the defendant as well as the state's interests in ensuring that a prosecution is not jeopardized by the unauthorized acts of overzealous officers. Although the factors to be weighed have been established by appellate courts, the process of weighing and the criteria for determining the relative weight of each factor has not been elucidated.

The first criterion must be found favorably to the prosecution in this case. The second, third and fourth criteria must be found favorably to the prosecution, as it pertains to the actual knowledge of the prosecutor; but unfavorably as to the possibility of nescient indirect use by means of the testimony of witnesses who themselves may have knowledge of privileged information.

It is undisputed that the Hamilton County prosecutor has acted resolutely to avoid contact with any privileged material; and, for that matter, that the prosecutors in the other jurisdictions attempted to avoid and/or remedy any 6th Amendment violation. privileged information. It is also important to note that the materials seized could not, upon a cursory glance, be determined with certainty to be, or not to be, privileged. This uncertainty was magnified by the fact that previously an apparent attorney communication was widely use to further the alleged criminal actions of the defendant. Thus, we are presented here with a good faith effort of prosecuting attorneys to protect privileged information, complicated by agents who may have overzealously read more of certain documents than they should have, in a situation where facially privileged communications had been used in the past to further alleged criminal activity. The conduct of the prosecutors involved in this matter is certainly not outrageous, but at worst reflections lack of foresight and sufficient preparation. The activities of some of the agents is subject to serious criticism, but was not outrageous under the circumstances.

Defense counsel argues that dismissal is the only possible solution, citing a case decided by the New Jersey Supreme Court:

> "To accept the State's contention that it has diverted the flow of illicit information away from a group of prosecutors, we would be required to engage in groundless speculation. We could not, of course, ask the assertedly 'untainted' prosecutors what they do not know

about this case and obtain a useful answer. To inquire whether they had learned of the illicitly acquired admissions would run the risk of informing them indirectly. Thus, any examination of the adequacy of the State's procedures must confine itself to questioning of those already in possession of 'tainted' information. Yet after learning of the elaborate procedures for preventing further disclosure...we would still be left to speculate about their success...While the State's procedures demonstrate the good faith of its supervisory officers, and while those procedures may be useful in demonstrating that the evidence to be used a trial is free from any taint..., they may not transform any knowledge of trial strategy by certain State officials into a harmless infringement of defendant's Sixth Amendment rights."

***

"Premature disclosure of trial strategy upsets the presumed balance of advocacy that lies at the heart of a fair trial...Because these more egregious violations do not involve the disclosure of evidence, an exclusionary remedy would be insufficient to vindicate defendant's right, deter official misconduct or maintain judicial integrity. A dismissal of the prosecution would thus be necessary as the only means to avoid the denial of one of the fundamental requirements of due process of law."

[New Jersey v. *Sugar* (1980), 84 N.J. 1, 18, 21; 417 A.2d 474,480,483; 1980 LEXIS 1389}

The above-cited New Jersey case does not permit the weighing of factors, but, on the contrary, holds in effect that weighing is impossible. As a result, this Court finds *New Jersey* v. *Sugar (supra)* inapplicable in Ohio where weighing is specifically required. Rather, the following federal case, cited by the prosecution, appears to this Court to contain a rationale applicable to Ohio:

> "...[T]he court finds that there was serious misconduct on the part of the lead prosecutor. The court further finds that the defendants have shown actual prejudice resulting from the government's misconduct.... Regardless of the prior general knowledge which the government had about defense strategy, the court finds based on the evidence before it...that the defendants have been an will continue to be prejudiced by the government's misconduct in improperly copying and reviewing the documents in question because they provided an important insight into defense tactics, strategy, and problems. The government has thus failed to meet its burden of showing that there has been and will be no prejudice to the defendants as a result of the government's conduct...
>
> "The defendants argue that dismissal is the only appropriate remedy under the circumstances of this case..

"The Supreme Court has held that although courts must be responsive to proven claims that governmental misconduct has rendered counsel' assistance to the defendant ineffective, at the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. United States v. Morrison, 449 U.S. 361, 364 (1981); see, also, United States v. Davis, 646 F.2d 1298, 1303, cert. Denied, 454 U.S. 868 (1981); United States v. LaRouche Campaign, 695 F. Supp. 1290..... "

"The current state of the decisional law on this subject does not permit dismissal except in situations where the government misconduct is found to be 'outrageous.' While the misconduct of the government in this case must be viewed as very serious, it does not fall into that category of cases in which government conduct has been found to be outrageous...

"Courts faced with prosecutorial misconduct or violations of discovery rules have considered sanctions including granting a continuance, granting a new trial,

> disqualifying the prosecutor, imposing disciplinary sanctions on the offender, holding the offender in contempt, publicly chastising the offender and excluding evidence...The Morrison court noted that the proper approach to a Sixth Amendment violation is to 'identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial"
> *[United States v. Horn* (1992), 811 F. Supp, 739, 751; 1992 U.S. Dis. LEXIS 19587]

Because this Court has found the conduct of the prosecution side of the instant matter not to have been outrageous, but because it is clear that a 6th Amendment violation has occurred, some sanction is appropriate. Of the sanctions suggested in *United States v. Horn (supra),* the Court believes that a continuance and/or new trial would be the appropriate sanctions. Such sanctions would permit the defense to revamp its strategy so that the prosecution could not be aware of it, and thus allowing the resetting of the balance of advocacy discussed in *New Jersey v. Sugar (supra).* However, there is no need to impose these sanctions because they have already been imposed, albeit for other reasons. The Court of Appeals granted a new trial in this case for the reason that the trial court had abused its discretion in not granting a continuance. Thus, both a continuance and a new trial have been granted. The defense has had ample time to revise its strategy. In fact, it is obvious that after a trial of several weeks that led to a conviction the defense having been given the opportunity to readjust its

strategy, will perforce do so. The fact that the prosecution, or some prosecution witnesses may have been aware of a defense strategy contemplated years ago before a trial long since held and reversed, has no relevance to the trial about to commence in January, 2006. Both sides have seen in full the actual presentation of the other side's case, and each side has undoubtedly revisited its strategy accordingly. Although the continuance and new trial granted by the Court of appeals was not awarded as a sanction, it has the same effect as a sanction .[*"A rose by any other name smells as sweet."* Shakespeare; Romeo and Juliet]

For the foregoing reasons, the motion to dismiss is denied. Counsel shall present an entry denying the motion on the first date of trial.

Phillip R. Cummings
Assisting Prosecuting Attorney
Suite 4000
Cincinnati, Ohio 45202
FAX: 946-3021

Mary Jane McFadden
Attorney at Law
Suite 210
175 South Third Street
Columbus, Ohio 43215-5134
FAX: 614-221-3985

Entered June 28, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: MAITER OF SEARCHES OF	) CASE NO. 5:02 MC 120) SEARCH WARRANT) CASE NO. 5:02-05174M
326 OAK CREST, COPLEY TWP, OH	)) **MEMORANDUM**
and	) **OPINION**)
316 BOYLE STREET, AKRON, OH	) Magistrate Judge) James C. Gallas)

Philip F. George, Jr. has filed a counseled emergency motion for return of materials seized from his office and residence on December 23, 2002 claiming that they are attorney-client privileged or work product protected.[1] The searches were in

---

[1] The motion is based on former Rule 41(e) of the Federal Rules of Criminal Procedure. However, presently and at that time the amended and recodified Rule 41(g) is in effect, which provides:

> **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court mut return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

18 U.S.C. Federal Rules of Crim. Pro. 41(g).

relation to two pending state criminal gambling prosecutions in Hamilton and Lorain Counties, Ohio. Mr. George had been indicted in October 2001 on 11 counts related to gambling activities in Hamilton, County. The case involved a tip-ticket scheme which is similar to a scratch-off lottery ticket. See *State v. George,* 2004 WL 1231572 (Ohio App. 1 Dist. June 4, 2004). Mr. George was convicted on a portion of the charges. However, as summarized by the state appellate court in reversing and remanding:

> The basic allegations were that George and a number of co-conspirators ran a gambling ring under the guise of charitable gambling for United Saghbeen, Child Care, and other charities. The state argued that George was in charge of everything from the distribution to the accounting. The state further argued that George gave only a small percentage of the actual profits from the tip-tickets to the charities, split profits with the bars that sold the tickets, paid so-called 'volunteer' workers, and laundered money. The state claimed that George and his cohorts swindled the charities out of nearly $60 million.

State v. George, supra at *2.

The searches conducted pursuant to the December 2002 warrants were not the first invasion of Mr. George's privacy; prior seizures were made under judicial supervision:

In February 2002, Ohio Department of Public Safety agents searched George's home in relation to another case. George called an attorney, Charles Quinn, to come to the house and to observe the search. The agents seized numerous communications between George and his counsel relating to the current case. The state later returned these in a box because they were wrongfully taken. On the advice of his counsel, George preserved the documents in the box. He then moved to dismiss the case for violations of his due-process rights. George also moved to dismiss the indictment for vagueness.

Before the trial court heard arguments on the motions to dismiss, the Ohio Department of Public Safety *again* searched George's home in December 2002 on yet another investigation. They *again* seized the same documents (now in a box) that had been returned to George, along with other documents allegedly relating to this case. George claimed that the documents seized included various trial-preparation materials that neither he nor his counsel could reproduce before his trial was set to begin in February 2003. He also insisted that the documents revealed important trial strategies.

State v. George, supra at *2.

The December 2002 search mentioned in the opinion was conducted pursuant to this Court's authorization. The affiant was IRS agent, Robert M. Thatcher, but the return came from the Ohio agency task force not the IRS. Agent Thatcher had related that the seizure was for potential use of evidence in the prosecution of gambling in violation of 18 U.S.C. §1955, Racketeer Influenced Corrupt Organization (RICO) in violation of 18 U.S.C. §1961, money laundering in violation of 18 U.S.C. §1956, tax evasion in violation of 26 U.S.C. §7201, willful failure to file federal income tax returns in violation of 26 U.S.C. §7203, filing false tax returns in violation of 26 U.S.C. §7206(1), aiding and abetting the filing of false federal tax returns in violation of 26 U.S.C. §7206(2) and a conspiracy to commit a substantive offense and impair the Internal Revenue Service in violation of 18 U.S.C. §371. In the description of property taken, the return lists a box of miscellaneous documents sealed by Agent Kasarab. No federal tax proceeding against Philip F. George, Jr. has yet to be initiated following nearly 16 months since the execution of the federal warrant. Rather it appears that the purpose of the search was in relation to the prosecutions in Hamilton and Lorain Counties.

The government in its response to Mr. George's emergency motion for return of property explains that Special Agent Kasarab of the Internal Revenue Service was involved in a search of the office area of the home and noticed mixed with the documents and records that were subject to seizure were items that potentially involved attorney-client privilege. He segregated these items and sealed

them in envelopes and boxes for review by the "privilege team." (Docket No. 2). Mr. George points out that Special Agent Robert Thatcher, who is in charge of the investigation, was aware of the pending indictments in Hamilton and Lorain Counties at the time of the search. Further, prior to the search Special Agent Kasarab gave a briefing to the search team to be certain that the agents observed a protocol with regard to items to be seized in the event documents were discovered that were not delineated in the warrant. Special Agent Thatcher testified at a hearing in Lorain County, "As I recall, it was basically stated that if you come across anything you feel shouldn't be viewed, stick it in an envelope, seal it up, and we'll deal with the issues later." (Lorain TR. 8/25/03, pg. 21, Reply Brief, Docket No. 8, Exhibit B). With the plan to segregate and seal seized materials in place, recovery of privileged materials was clearly anticipated in the December 2002 searches.

The Lorain County testimony further shows that Special Agent Kasarab worked jointly with Special Agent Thatcher and the documents were taken to their shared Akron office. (Lorain TR. 8/25/03, pg. 60). Mr. George focuses on testimony that Special Agent Kasarab could not vouch in court whether or not privileged materials may have been taken but not sealed (Lorain TR. 8/25/03, pg. 73, Reply, Docket No. 8, Exhibit B). Nonetheless, there was a legitimate law enforcement purpose to the December 2002 searches. The searches were not as Mr. George insinuates merely a ruse to gain an advantage of a peek at the progression of Mr. George's legal defense. This contention ultimately

fails Mr. George because he has produced nothing to demonstrate that law enforcement efforts to segregate the ostensibly privileged materials were anything but successful.

The government stressed in its response that it had created a "privilege team" to segregate and protect the materials from disclosure to itself and that the "privilege team" was a well-established procedure (Docket No. 7). The Court has some reservation about the claim that this review and segregation format is well-established procedure especially given that the "privilege team" turned out to be a sole Assistant United States Attorney, Benita Y. Pearson. Nevertheless, it is possible to build "chinese walls" for ethical purposes and the use of one individual lessens the chance of improper disclosure[2]

AUSA Pearson relates that she has reviewed the materials that were sealed and has been in communication with Mr. George's counsel, Mr. John Ricotta and Ms. Mary Jane McFadden. Initially her primary review of the materials took place at the office of the Internal Revenue Service in Akron, Ohio and on completion of review, the materials were removed from the IRS office and transported to the Cleveland office of the United States Attorney pursuant to an agreement with Attorney Ricotta. AUSA Pearson states that as a result of her review, she discerned that some documents seized were

---

[2] Under somewhat similar circumstances, a "taint team" was set up to review documents seized from a law office in *U.S. v. Search of Law Office, Residence and Storage Unit Alan Brown*, 341 F.3d 404, 407 (5th Cir. 2003)

privileged and should be given to defense counsel and requests that the Court determine whether the remaining items, attorney bills and certain audiotapes are privileged, or covered under work product protection.

According to Mr. George, the current status of the documents is that they are in the possession of Attorney Ricotta who has kept the documents in the condition they were sent to him by AUSA Pearson. It is anticipated that Attorney Ricotta will be a witness if the government chooses to deny that its agents sought to obtain defense counsel's strategy. Attorney Ricotta is no longer acting as counsel in this matter (See Reply, Docket No. 8). Regardless of defense counsel's current theory to challenge the criminal proceedings against Mr. George, the Court orders the return of the materials primarily because their seizure exceeded the scope of the judicial warrant.

Discussion:

The government's position from the beginning has always been that it had "arranged a suitable procedure to handle this situation" and that Mr. George's motion for return of property be denied (Docket No. 2). It is revealing that the government did not argue that the motion was an improper exercise of this court's "anomalous" equitable jurisdiction under Rule 41(g). See *United States v. Search of Law Office, Residence and Storage Unit Alan Brown*, 341 F.3d 404, 410 (5th Cir. 2003); *United States* v. *Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974). Ordinarily Rule 41(g) and predecessor 41(e) were used to seek the return of

seized property post-indictment. See *Ramsden* v. *United States, 2* F.3d 322, 324 (9th Cir. 1993). However, in exceptional cases the district courts have the power to entertain such motions as civil equitable proceedings, but the district court must exercise "caution" and restraint before assuming jurisdiction. *Id. "Calandra* clearly implied that the target of a government investigation could not use [former] Rule 41(e) - which extends no further than the limits of an exclusionary rule - to prevent the grand jury from having access to illegally obtained evidence." *Search of Law Office,* 341 F.3d at 412; *Calandra,* at 354 n. 10. The Supreme Court "noticeably omitted" the possibility that Rule 41(e) could ever be used by the victim of an illegal search to suppress *evidence pre-indictment.* See *Search of Law Office,* 341 F.3d at 412 n. 37. The safeguard against the indefinite retention of seized property by the government is the fact that a grand jury term is limited. See *Standard Drywall, Inc.* v. *United States,* 668 F.2d 156 (2nd Cir. 1982), *cert. denied,* 456 U.S. 927 (1982); *Church of St. Matthew* v. *United States,* 845 F.2d 418 (2nd Cir. 1988). Accordingly, the general rule has been that a motion for return of property should be deferred until after an indictment has issued in the absence of showing irreparable harm. *See In Re Sentinel Government Securities,* 530 F. Supp. 793 (S.D. N.Y. 1982); *In Re Searches of Semtex Industrial Corporation,* 876 F. Supp. 426, 431 (E.D. N.Y. 1995).

When a defendant raises a claim of irreparable harm, usually the government's statement that the aggrieved party has access to the seized records and that photocopies are available, counters a claim of irreparable harm. See *Standard*

Drywall, supra; Church of St. Matthew, supra; In Re Searches of Semtex Industrial Corp., 876 F. Supp. at 431. Moreover a denial of a pre-indictment Rule 41(g) motion is generally appealable only if the motion relates to return of property involving an aggrieved party who is not the subject of criminal investigation. See *DiBella v. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L.Ed.2d 614 (1962). However, it is difficult to clearly state that this matter is clearly pre-indictment. The search warrant was executed by agents of the State of Ohio (as evidenced by the return) and this material was intended to be used by these agents in pending state prosecutions in Hamilton and Lorain Counties. In that sense Mr. George's motion should be regarded as a post-indictment.

The Court is aware that the decision in *United States v. Search of the Law Office, Residence and Storage Unit Alan Brown*, 341 F.3d 404 (5th Cir. 2003), the court held that the aggrieved party not made a substantial showing of irreparable harm due to vague allegations of attorney-client privilege. In contrast, though, Mr. George has substantiating proof for a portion of his claim by the government's concessions in the report from AUSA Pearson.

The "privilege team" has concluded that attorney-client and work product protected materials were seized. However, AUSA Pearson disputes release of specific sets of materials. The first set consisting of attorney fee bills and fee agreements is, as the government argues, generally not protected under attorney-client privilege. Overlooked, though, is a key point which is that the search warrant did not encompass these materials. The warrant was

restricted to material listed in Schedule B (attached) concerning individuals and entities listed in Schedule A.[3] The warrant did not permit the state agency to seize all of Mr. George's papers and effects. The attorney bills and agreements with counsel were not books or records of operation of gambling or charitable organizations. The seizures were intended to be limited in scope, and the Court did not anticipate nor was it informed that the search team had a plan for seizure of documents which "shouldn't be viewed." This is a situation of overlap of the question of attorney-client privilege with possible overbreadth in the execution of the warrants. The government argues that it should nonetheless retain these items because they are not in its view clearly attorney-client privileged. The Court disagrees. These were not documents intended to be seized. The United States is ordered to return the attorney bills and fee agreements to Mr. George and is further ordered not to retain any copies. Nor may any state, county or other local government agents retain copies.

The second set of materials concerns a transcript of a sworn statement made by an individual at the Lakewood Police Department. The government contends it bore no indication of privilege and was not a confidential communication between the client and legal representative and it was not prepared in anticipation of litigation. The

---

[3] Attachment B captioned "Items To Be Seized" describes the material to be seized as essentially records whether stored on paper or magnetic media, programmable instruments, electronic address books, calculators or any other storage media relating to the financial condition or operation of the listed charitable organizations.

government points out that Attorney Ricotta had no objection to the government's argument that the sworn statement was not a matter protected as work product (Response of Privilege Team, Docket No. 7, pg. 11). Again the government loses sight of the fact that while it may not be work product or attorney-client privileged it was beyond the scope of the financial records for which seizure was judicially authorized. Accordingly, that too should be returned, and no copies retained by any government agents.

The third set of items are legal memoranda from Mr. George's defense counsel. AUSA. Pearson concedes that these clearly are work product. These papers should be returned and no copies retained by any government agents.

The fourth set of items consists of audio tapes which AUSA Pearson states were witness interviews conducted in 2001 by an investigator hired by Mr. George's attorney. These tapes do conform to items to be seized under the warrant since they concern the operation and finances of at least one organization allegedly operated by Mr. George. Attorney McFadden claimed that the audio tapes were her work product and were prepared on her behalf and that the private investigator's identifying statement to the interviewees was factual. AUSA Pearson concedes that the work product doctrine may protect disclosure of material prepared by a private investigator working on behalf of an attorney citing *Chaudhry v. Gallerizzo,* 174 F.3d 394, 403 (4th Cir. 1999). However, Ms. Pearson is reluctant to part with these items because she vaguely contends that they may be made for the purpose of committing or

furthering a crime or fraud. Review of the audiotapes discloses no clear improper purpose and the Court is not concerned with any question over admissibility. The Court finds that the audiotapes were protected work product and must be returned to defense counsel with no copies retained by any government agents. All items segregated as potentially privileged or work-product protected are to be returned and no copies retained by any government agents.

Motion to Unseal:

Mr. George has also moved to unseal the affidavit submitted in support of the warrants (Docket No. 3). The government opposed the motions citing *In Re Search Warrant for 2934 Anderson Morris Road, Niles, Ohio,* 48 F. Supp. 2d 1082 (N.D. Ohio 1999). That case states, however, that the general rule is a person aggrieved by deprivation of property has a right to inspect and copy the affidavit on which the warrant was issued. *Id.* at 1083. Mr. George speculates that the affidavit was sealed because of allegations of a link to terrorist activities due to statements made by state task force agents concerning his Lebanese background. The government's expert witness has testified at Mr. George's trial in Hamilton County on the claim of Mr. George's involvement in terrorist activities, and the state appellate court found the presentation laughable.

There is no longer any compelling government interest in secrecy to protect an ongoing investigation or credible evidence of danger in

exposure of the identity of potential witnesses to Mr. George. Accordingly the motion to unseal is granted and Mr. George and his counsel will be permitted to inspect and copy the affidavit, and the Clerk of Court is instructed to send a certified copy of the complete affidavit and supporting schedules to Attorney Mary Jane McFadden at McFadden, Winner and Savage, 175 South Third Street, Suite 210, Columbus, Ohio 43215-5134. This concludes this Court's involvement in "a series of searches and seizures too bizarre to be fictional." See *State v. George, supra* at * 1. *Motions granted.*

IT IS SO ORDERED.

/s/James S. Gallas
United States Magistrate Judge

Dated: June 28, 2004

ATTACHMENT B
ITEMS TO BE SEIZED

There is now being concealed certain property. for the period of January 1,1999 to the present with respect to the [Individuals business entitics, or charities set forth in Attachment C, to-wit:

All of the following records. whether stored on paper, on magnetic media such as tape, cassette, cartridge, disk, diskette or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", calculators, or any other storage media together with indicia of use, ownership, possession, or control of such records.

- Any records relating to the financial condition or operation of a charitable organization.

- Copies of Complete or partially complete individual, corporate or charitable federal, state or local returns for the individuals, business entitles, orcharities set forth in Attachment C.

- Financial statements relating to the financial position of PHILIP F. GEORGE, JR., JAMES H. JACKSON, FLARE GAME TECHNOLGY, INC, ACE EQUIPMENT COMPANY. GENNCO VENDING COMPANY

d.b.a. GEORGE'S MUSIC. J&J TICKETS and AD-VEND.

- Applications for tax-exempt charitable status in the name of any organization and any correspondence from the Internal Revenue Service regarding such an application or operation of a charity.

- United States Currency and financial Instruments, but not limited to stocks and bonds

- Books, records, invoices, receipts, records of real estate transactions, bank statements and related records, passbooks relating to, money drafts, letters of credit, money orders, bank drafts and cashier's checks, bank checks, safe deposit box keys, money wrappers and other items evidencing the obtaining, secreting, transfer, and for expenditure of money and/or safes

- Addresses and/or telephone books, rolodex indexes and any papers reflecting names, addresses, telephone numbers, paper numbers. fax numbers and/or telex numbers of co.-conspirators, sources of supply,

customers, financial institutions, and other individuals or businesses with whom a financial relationship exists. Indicia of occupancy, residency rental and/or ownership of the premises described herein, including but not limited to utility and telephone bills, canceled envelopes, rentals, purchase or lease agreements and keys.

- Books, records, invoices, business logs, and any other documentation relative to the daily operations of a gambling business or charity indicating the profit and expenses.

- Papers, tickets, notes, receipts and other items relating to domestic and international travel.

- Any documentation and/or notations referring to the computer, the contents of the computer the use of the computer or any computer software and/or communications. All information within the above listed items including but not limited to machine readable data, all previously erased data, and any personal communications including but not limited to e-mail, chat capture, capture files,

correspondence stored in electronic form, and/or correspondence exchanged in electronic form.

- Computers, central processing units, computer motherboards, printed circuit boards, processor chips, all data drives, floppy drives, optica drives, tape drives, digital audio tape drives, and/or any other internal or external storage devices such as magnetic tapes and/or disks. Any terminals and/or video display units and/or receiving devices and/or peripheral equipment such, as, but not limited to printers, digital scanning equipment, automatic dialers, modems, acoustic couplers and/or direct line couplers, peripheral interface boards, and connecting cables and/or ribbons. Any computer software, programs and source documentation, computer logs, magnetic audio tapes and recorders, digital audio discs and/or recorders, any memory devices such as, but not limited to, memory modules, memory chips, bubble memory. and any other form of memory device utilized by the computer or its peripheral devices. (This description constitutes the definition of a computer system

as that term may be used throughout this document.) Any and all computer related accessories or equipment not specifically mentioned here in, all equipment having been used in violation of O.R.C. 2923.24 Possessing Criminal Tools, and/or O.R.C. 2923.32, Corrupt Activity.

- Financial and licensing information with respect to the computer software and hardware.

- Personal communications in electronic or written form, including but not limited to a-mail, chat capture, capture files, correspondence stored in electronic or written form as indicative of use in obtaining, maintenance, and/or evidence of said offenses.

- Video Game Machines to Include but not limited to "Treasure Quest, "Infinity" and "Pot of Gold" machines, spare components, game cartridges, keys to gain entry to the machines and moneyboxes within the machines, manuals and/or instructions or notes referring to the operation of said machines, computer programs within the machines,

access numbers, passwords. These machines have built in counter, both mechanical and electronic that pertain to the *reconstruction of income based* upon usage.

- Tip tickets to include but not limited to (Stamp Tip Tickets, Rip-off tickets, Packs and Peel-off Tickets). Tip Ticket Dispensing Machines, Bins that contain the above listed Items.

- Records of gambling machine vendors, cash proceeds from these machines being Video Slot Machines, Tip Ticket Dispensing Machines and Stamp Machines (BINGO), including cash locked within the machines, gambling records, records of gambling machine usage including payoff to winners, income from gambling machine vendors, lease and/or foan agreements for the gambling machines or any other gambling devices defined in section 2915.01 of the Ohio Revised Code.

If found, said items will be seized and used as evidence in the prosecution of section(s)

Title 18 USC 1955 (Gambling), Title 18 USC 1961 R.I.C.O.), Title 18 USC 1956 (Money

Laundering), Title 26 USC 7201 (Evasion), Title 26 7203 (Willful Failure to File Returns), Title 26 USC 7206(1) (Materially Filing a False Return), Title 26 USC 7206(2) (Aiding and Abetting the filing of a False Return), and Title 18 USC Section 371, (Conspiracy to commit a substantive offense and conspiracy to impair and impede the Internal Revenue Service), all violations against the United States of America.

Entered June 4, 2004

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-030216
Plaintiff-Appellee,	:	TRIAL NO. B-0107787-B
vs.	:	
		OPINION.
PHILIP F. GEORGE, JR.,	:	
Defendant-Appellant.		

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed, Judgment Entered in Part, and Cause Remanded

Date of Judgment Entry on Appeal: June 4, 2004

McFadden, Winner & Savage and *Mary Jane McFadden*, and *Clodfelter & Gutzwiller* and *Robert H. Gutzwiller*, for Appellant,

Michael K. Allen, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, for Appellee.

MARK P. PAINTER, Judge.

{¶1} Defendant-appellant Philip George appeals his convictions for gambling, operating a gambling house, money laundering, conspiracy, and engaging in a pattern of corrupt activity.

{¶2} This is one of the most bizarre cases in recent memory. There are the usual evidentiary and procedural issues, but also alleged terrorist connections and a series of searches and seizures too bizarre to be fictional. The trial court referred to the defendant's counsel and their tactics as "silly," "adrift," and "amazing." We could not think of more appropriate terms to describe this case.

{¶3} But the factual complexity of the case does not obscure the legal simplicity of the outcome. We reverse this case on a simple procedural matter-the trial court's refusal to grant the defendant's requests for a continuance. And we must dismiss one of the charges for vagueness.

{¶4} Before we begin our discussion of this case, a little background information is appropriate.

I. Charities and Tip Tickets

{¶5} In 1997, the Ohio Supreme Court held that bars and other liquor-permit-holding premises could participate in charitable gambling as long as neither the owners nor the employees were compensated for their participation.[1] This ruling

---

[1] *Freedom Road Found. v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 1997-Ohio-346, 685 N.E.2d 522.

opened the floodgates for a large volume of untapped charitable opportunities, as well as an equally large opportunity for abuse.

{¶6} This case involved a tip-ticket scheme. A tip ticket is similar to a scratch-off lottery ticket: the customer purchases a ticket and pulls a tab on the ticket, which then reveals whether the customer is a winner or, more likely, a loser. The tickets come in sets with predetermined payouts and profits. So if every ticket from a particular set is sold, the charity knows exactly how much money it should make from each set.

{¶7} For example, imagine a box of 3,000 tickets. If there is a predetermined profit of $1,000 on that set, there will be $1,000 remaining after the 3,000th ticket has been sold. The order is theoretically random, so any given ticket could be a $100 winner or a loser.

{¶8} The system is not perfect because the 3,000th ticket could be a big winner or a loser. In the former scenario, there is little incentive to sell the final ticket because there is already a profit of more than $1,000. In the latter, there is no incentive for a customer to purchase the losing ticket (assuming the customer knows that it is a loser and assuming he is not Richard Pryor in *Brewster's Millions).* Legally, the seller must sell all the tickets. But if most of the tickets that remain in the set are winners and the till already has more money than the guaranteed profit, the seller may be tempted to pocket the difference and still give the charity its guaranteed profit.

{¶9} Another possible abuse of the system comes from the accounting practices that the distributors of the tickets and the sellers use. A distributor could sell the tickets to the sellers, split the profits, or simply hide the profits from the charity–all of which are illegal.

II. An Unusual Case *from Indictment* to *Sentencing*

{¶10} The madness here started when the state decided to crack down on these abuses. George's personal involvement in this case concerned a tip-ticket scheme that supposedly benefited the United Saghbeen Society, the Child Care Foundation, and other charities. He was the alleged mastermind behind a statewide charity scam.

{¶11} In October 2001, the state indicted George on 11 counts relating to his gambling activities in Hamilton County. Counts one and two were gambling charges relating to two different time periods.[2] Count three charged George with operating a gambling house.[3] Counts six through eight concerned money laundering.[4] Count 10 charged

---

[2] See R.C. 2915.02(A)(2).

[3] See R.C. 2915.03(A)(1).

[4] See R.C. 1315.55(A)(1) through (3).

George with conspiracy[5]; and count 11 covered George's engaging in a pattern of corrupt activity[6]. The jury acquitted George of the other three counts, so they are irrelevant here.

{¶12} The basic allegations were that George and a number of co-conspirators ran a gambling ring under the guise of charitable gambling for United Saghbeen, Child Care, and other charities. The state argued that George was in charge of everything from the distribution to the accounting. The state further argued that George gave only a small percentage of the actual profits from the tip-tickets to the charities, split profits with the bars that sold the tickets, paid so-called "volunteer" workers, and laundered money. The state claimed that George and his cohorts swindled the charities out of nearly $60 million.

{¶13} Reading this decision up to this point, you probably have a much better idea of what this case is about than you could ever glean from the indictment or the bill of particulars. The indictment merely repeated the appropriate statutory language and gave some minor descriptions of the alleged illegal activity. George requested a bill of particulars, which again repeated the relevant statutory language and gave only a modicum of additional information.

{¶14} In February 2002, Ohio Department of Public Safety agents searched George's home in relation to another case. George called an attorney,

---

[5] See R.C. 2923.01(A).

[6] See R.C. 2923.32.

Charles Quinn, to come to the house and to observe the search. The agents seized numerous communications between George and his counsel relating to the current case. The state later returned these in a box because they were wrongfully taken. On the advice of his counsel, George preserved the documents in the box. He then moved to dismiss the case for violations of his due-process rights. George also moved to dismiss the indictment for vagueness.

{¶15} Before the trial court heard arguments on the motions to dismiss, the Ohio Department of Public Safety *again* searched George's home in December 2002 on yet another investigation. They *again* seized the same documents (now in a box) that had been returned to George, along with other documents allegedly relating to this case. George claimed that the documents seized included various trial-preparation materials that neither he nor his counsel could reproduce before his trial was set to begin in February 2003. He also insisted that the documents revealed important trial strategies.

{¶16} George again moved to dismiss, this time on Fourth- and Sixth-Amendment grounds. This motion also asked that the court continue the trial date to allow defense counsel time to recover the materials that had been seized, returned, and then seized again. George also moved to continue the hearing on the motion to dismiss for the same reasons.

{¶17} The trial court denied the motions to dismiss and denied the motions to continue the trial date because, according to the trial court, George

had unclean hands and the attorney-client documents were in "plain view." The trial court also revoked George's bond.

{¶18} George then filed a habeas-corpus petition to have his bond reinstated, which this court granted. But at a bond hearing following our order, the trial court set a new bond. This court ordered the trial court to show cause why it should not be held in contempt. The trial court then reinstated the bond after a hearing on the matter. Because of all of this, George was incarcerated for much of the time prior to his trial.

{¶19} And this mess continued into the trial. The roughly 3,000 pages of transcript suggest that everyone was, at some point, exasperated either with the duration of the three-week trial or with each other. Both the prosecutor and George's trial counsel repeatedly objected. And the trial court repeatedly questioned George's trial counsel's tactics, often telling them to "shut up" or "be quiet" and suggesting that they did not have any sense.

{¶20} During testimony, the trial court threatened a witness with contempt if she did not comply with his order to obtain financial records from the bar that she owned by the next morning. The bar was in Akron. The witness was in Cincinnati without a car. And it was the middle of winter.

{¶21} And near the end of the proceedings, the trial court admonished George's legally blind mother in front of the jury, threatening to find her in

contempt and to put her in jail. She had evidently been talking to George's wife during the trial.

{¶22} As for evidentiary matters, the trial court admitted a recorded statement where George himself discussed the operation of a large gambling ring. But the statement was recorded after George had been indicted and related to a different investigation. The trial court also admitted numerous other recordings (both video and audio) and sent unofficial transcripts of these recordings to the jury. George claimed throughout the trial that the state had not turned over George's statements or any of the unofficial transcripts in discovery.

{¶23} The jury found George guilty on eight of the eleven counts. But the strangeness of this case did not end there. At sentencing, the prosecution introduced various banking records to show George's fiscal involvement. And the prosecution brought in an investigator who testified that the United Saghbeen Society had funneled money to certain Middle Eastern terrorist organizations, including Hezbollah (incorrectly spelled "Hizballah" by the investigator) and HAMAS.

{¶24} George is a third-generation American and is Catholic. George requested a continuance at sentencing to allow him to gather evidence to rebut the state's accounting evidence and newfound terrorist claims. But the trial court refused, sentencing George to 25 years' imprisonment and a $50,000 fine.

{¶25} George now appeals. He assigns four errors, each covering a range of arguments: (1) the trial court erred by failing to dismiss the indictment on Sixth-Amendment grounds; (2) the trial court erred by failing to dismiss the indictment where the indictment failed to meet constitutional requirements; (3) George did not receive a fair trial and due process; and (4) the trial court improperly imposed consecutive sentences. We will discuss the first three assignments, but George's fourth assignment is moot because we are granting a new trial.

III. Right to Counsel

{¶26} In his first assignment, George argues that the trial court should have dismissed the indictment after the state agents violated his right to counsel by unlawfully seizing attorney-client communications.

{¶27} Both the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to counsel. This right does not attach until after the initiation of formal charges.[7] And an accused does not receive effective assistance of counsel if he is denied private consultation with his counsel.[8]

---

[7] See *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446.

[8] *Coplon v. U.S.* (C.A.D.C. 1951), 191 F.2d 749.

{¶28} When examining government intrusion into the attorney-client privilege, we must strike a balance between the Sixth-Amendment interests of a criminal defendant and the state's interests in ensuring that a prosecution is not jeopardized by the unauthorized acts of overzealous officers, by applying the Weatherford test.[9] The test is applied on a case-by-case basis, analyzing the following four factors: (1) whether the government deliberately intruded in order to obtain confidential and privileged information; (2) whether the government obtained directly or indirectly any evidence that was or could have been used at trial as a result of the intrusion; (3) whether any information obtained was or could have been used in any manner detrimental to the defendant; and (4) whether details about trial preparation were learned by the government.

{¶29} As we have already noted, this is an unusual case. Never before have we heard of a situation where state agents purposefully seized attorney-client communications twice in the same case. "Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful."[10] Surely if state agents were allowed to seize attorney-client communications at any time under the guise of another investigation, this right would be meaningless.

---

[9] *State v. Milligan* (1988), 40 Ohio St.3d 341, 533 N.E.2d 724, citing *Weatherford v. Bursey* (1977), 429 U.S. 545, 97 S. Ct. 837.

[10] *U.S. v. Levy* (C.A.3, 1978), 577 F.2d 200, 209.

{¶30} The Ohio Department of Public Safety twice searched George's home and seized what George claims were privileged attorney-client communications. That some documents were returned after the first seizure suggests that the state seized some materials it should not have. In a hearing, George's attorney testified (while being cross-examined by her co-counsel-yet another anomaly in this case) that she had sent a packet of documents to George just before the December 2002 search that was no longer at George's house after the search. George and his wife also testified that numerous legal documents relating to this case were seized. But we have no way of determining what, exactly, was seized in the December 2002 search.

{¶31} The documents are apparently somewhere in the geographical jurisdiction of the United States District Court for the Northern District of Ohio. It seems that the federal prosecutor tried to return the documents to George's trial counsel, but they refused because they did not want to become part of the chain of custody.

{¶32} Because nobody has had access to the documents in the federal prosecutor's possession, we cannot say whether there was any privileged attorney-client information seized in December 2002. And we cannot say whether the prosecutor in this case had access to any of the supposedly confidential information. We therefore cannot determine whether the motion to dismiss should have been granted or denied. The issue is not ripe for a decision and the lack of these documents for purposes of this motion is yet another reason this case should have been

continued. But the motion should be considered when this case is remanded to the trial court. Perhaps by then, the documents will have been found.

{¶33} We therefore overrule George's first assignment of error as premature.

IV. The Indictment

{¶34} In his second assignment, George argues that the indictment failed to adequately inform him of the charges and that the trial court erred by not dismissing it. While the indictment was not the state's finest work, most of it was constitutionally satisfactory. But count three, the charge of operating a gambling house, should have been dismissed.

{¶35} George now argues that the state purposely drafted a vague indictment. The reason? So it could confuse him and his trial counsel and introduce new evidence later in the trial. We understand George's frustration. It is also clear that George's trial counsel did not need any help getting confused.

{¶36} None of the 11 counts in the indictment were particularly well written, nor did the bill of particulars add much clarity. The indictment and the bill of particulars skirted along the fringes of constitutionally acceptable procedure. But most of the counts satisfied the constitutional requirements-albeit barely. We are forced to hope that this

vagueness was a result of prosecutorial laziness rather than prosecutorial misconduct.

{¶37} The state did fail to meet its constitutional requirements for count three, operating a gambling house. R.C. 2915.03(A)(I) states, "No person, being the owner or lessee, or having custody, control, or supervision of premises, shall: *** Use or occupy such premises for gambling * * *."

{¶38} The third count of the indictment charged George with "being the owner or lessee or having custody, control, or supervision of premises, to wit: VARIOUS LOCATIONS IN HAMILTON AND CLERMONT COUNTY [sic], OHIO, used or occupied such premises for gambling * * *." The bill of particulars added this: "Defendants Jackson and George, along with other individuals and entities, set up several free standing instant bingo locations in Hamilton County and Clermont Counties [sic], Ohio, for purposes of engaging in charitable gambling. Jackson and George had custody, control, or supervision over the premises and directed how the operations should be run." The bill of particulars also listed several specific activities that George allegedly performed on the premises, including cheating, paying "volunteer" workers, and commingling funds.

{¶39} But nowhere in the indictment or the bill of particulars did the state bother to identify any of the actual premises (instant bingo locations) over which George allegedly had custody, control, or supervision.

{¶40} We have previously held that an indictment need not contain a recitation of the evidence supporting the charges.[11] The specific location, time, or circumstances of a conspiracy are not generally essential in an indictment.[12] A bill of particulars also need not give the accused specific evidence or serve as a substitute for a discovery demand.[13]

{¶41} But an indictment meets constitutional requirements only if it (1) contains the elements of the offense charged and fairly informs the defendant of the charges against him, and (2) enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.[14] And the indictment must contain "language sufficient to alert the person named therein that certain generally specified conduct constitutes a violation of an existing statute."[15]

{¶42} Further, a trial court must consider two questions when a defendant requests specific times, dates, or places in a bill of particulars: (1) whether

---

[11] *State v. Gingell* (1982), 7 Ohio App.3d 364, 455 N.E.2d 1066.

[12] Id., citing *Glasser v. U.S.* (1942), 315 U.S. 60, 62 S. Ct. 457.

[13] *State v. Gingell* (1982), 7 Ohio App.3d 364, 455 N.E.2d 1066.

[14] *State v. Childs*, 88 Ohio St.3d 558, 2000-Ohio-425, 728 N.E.2d 379.

[15] *State v. Gingell* (1982), 7 Ohio App.3d 364, 366, 455 N.E.2d 1066.

the state possesses such information; and (2) whether the information is material to the defendant's ability to prepare and present a defense.[16] If the answer to both of these questions is yes, then the state must provide such information in the bill of particulars.

{¶43} In *State v. Headley*,[17] the defendant was charged with trafficking in drugs, but the indictment failed to identify the controlled substance involved. The Ohio Supreme Court held that because the severity of the offense was dependent on the type of drug involved,[18] the identification of that drug was an essential element of the crime that had to be included in the indictment. We hold here that identifying which premises the defendant had in his custody, control, or supervision was essential in an indictment for operating a gambling house.

{¶44} We cannot see any way that count three informed George of the charges against him. George was charged with operating a gambling house, but the indictment and the bill of particulars never listed any specific locations. A "house" must of necessity be located somewhere. George could not possibly prepare a defense without knowing which "various locations in Hamilton and Clermont" counties would be involved in the case. The information was

---

[16] *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 551 N.E.2d 1261.

[17] (1983), 6 Ohio St.3d 475,453 N.E.2d 716.

[18] See id.; R.C. 2925.03.

material to George's ability to prepare and present a defense on this count.

{¶45} And we have no way of knowing what evidence the state presented to the grand jury. Further, George has no way of showing that the gambling houses he supposedly operated in this case are not the same gambling houses that might be involved in future prosecutions.

{¶46} Count three did not satisfy the constitutional requirements. We must therefore dismiss it.

{¶47} We therefore sustain George's second assignment of error as it relates to count three, but overrule it concerning all of the other charges.

V. The Continuances Should Have Been Granted

{¶48} In his third assignment, George provides a laundry list of complaints relating to the fairness of his trial and due process: (1) the trial court abused its discretion by denying his requests for a continuance to give him time to recover the trial-preparation materials that the government had seized; (2) George's unlawful pretrial incarceration damaged his trial counsel's ability to defend the case; (3) the trial court should not have admitted George's recorded statements; (4) the admission of certain recordings and letters denied George his right to confront the witnesses against him; (5) transcripts of certain recordings were not the best evidence and should not have gone to the jury; (6)

police reports of certain out-of-court statements should not have been admitted; and (7) the trial court was biased against George and harassed his trial counsel. Because we agree with his first argument, George's other six arguments are moot.

{¶49} The decision to deny a continuance is within the broad discretion of the trial court; we will not reverse it absent an abuse of that discretion.[19] An "abuse of discretion" is a decision that is unreasonable, arbitrary, or unconscionable.[20] The answer to whether an abuse of discretion has occurred in the denial of a continuance must be found in the circumstances of each individual case, particularly the reasons presented to the trial court at the time of the request.[21]

{¶50} When evaluating a motion for a continuance, a trial court should consider the following factors: (1) the length of the requested delay; (2) whether other continuances have been granted; (3) the inconvenience to the litigants, witnesses, opposing counsel, and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the

---

[19] *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078.

[20] *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

[21] *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, citing *Ungar v. Sarafite* (1964), 376 U.S. 575, 84 S. Ct. 841.

circumstance that gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique facts of each case.[22] Thus, we must balance these factors to determine whether the trial court abused its discretion in this case.

{¶51} While George did not ask for a specific time, he did ask for enough time to retrieve the documents. The trial court did not mention any previous continuances in its decision. Perhaps a continuance would have inconvenienced the prosecutor, the witnesses, and the court, but the inconvenience to George certainly outweighed any scheduling concerns of the other parties.

{¶52} We cannot stress enough that the facts of this case were unique. State agents twice seized George's personal communications with his attorneys. While we cannot say what, exactly, the government agents seized from George's house, we can say that George presented sufficient testimony to warrant a continuance to allow him to retrieve the documents or at least to re-create them.

{¶53} The trial court's reasons for denying the continuances included George's contribution to the circumstances necessitating the delay. The trial court stated–and the state now argues–that George contributed to the circumstances

---

[22] *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078.

because he ostensibly engaged in illegal activity while out on bond, causing the seizure of the documents, and declined an offer to return the material.

{¶54} Even if George had committed illegal acts while out on bond, that did not give the state the right to violate his constitutional rights by seizing privileged communications with counsel. And trial counsel should not have been forced to become part of the chain of custody of potential evidence just to move the current case along.

{¶55} A defendant does not waive his right to counsel merely by committing another crime–rather, the right exists precisely so that situations like this do not occur. And we certainly do not know about any other crimes from this record. Unfortunately, we cannot say what documents the state seized in December 2002. But we can say that there was sufficient testimony suggesting that the state had seized–and not returned–attorney-client materials a few weeks before trial was set to begin. The trial court's denials of George's requested continuances were arbitrary and unreasonable.

{¶56} The trial court therefore abused its discretion when it refused to grant George's motions for a continuance. This error was not harmless because George's allegations, if true, severely inhibited his ability to prepare a defense, and possibly gave the state access to privileged materials. We note that the partial dissent states that the defense lawyers should have accepted the return of the box of records. But that would open

counsel up to charges that they phonied up the contents. The documents were evidence relevant to both the motion to dismiss and the continuance issue. They should have been kept in the court's custody. Or copies should have been made and sent to George's counsel. And this kind of mess should not happen again.

{¶57} We must note that nowhere in the record is it suggested that the prosecutor in this case had anything to do with the February or December 2002 searches-they were conducted in a different county by a different prosecuting authority. But because of the nature of the rights at stake, we must reverse the trial court's decision and remand this case for a new trial.

{¶58} We therefore sustain George's third assignment as it relates to the trial court's overruling of his requests for continuances.

VI. Other Arguments

{¶59} Though the sentence is necessarily vacated by our decision today, we note that a 25-year sentence here is questionable at best. We doubt that it could be supported under Ohio's sentencing guidelines. And the odd allegations of "terrorist" activity vitiated the sentencing process. Obviously, faced with allegations that he was sending money to Middle-Eastern terrorist organizations, George should have been afforded the opportunity to respond. It would be odd indeed if George, a third-generation American Catholic, would be involved

with such groups. The failure to grant a continuance for that purpose was obviously reversible error.

{¶60} The pretrial incarceration was also questionable. But we have granted an appeal bond in this case, and we expect that George will remain free for his new trial, so that issue is now moot.

{¶61} The other evidentiary issues are moot, and we have little expectation that they will again arise, so we need not resolve them now.

VII. An Unbiased Trial Court

{¶62} While the point is now moot, we feel compelled to comment briefly on George's claim that the trial court was biased and that it harassed George's counsel.

{¶63} From the pretrial hearing throughout the trial, the trial court often chastised George's trial counsel for questionable tactics or procedure. While we might disagree with the manner and tone in which this was done, we also believe that George's trial counsel made some of the trial court's comments necessary because they had interrupted the trial or had taken an extremely unusual approach to the case. A typical exchange is reflected in the following:

> Prosecutor: Okay. Is there any question who was running this operation from start to finish, from the start of your involvement to the end of your involvement?

Witness: You mean Child Care?

Gutzwiller: I'll object to this. It is all encompassing. Covers all sorts of legal conclusions, and this guy is just fantasizing.

{¶64} The court struck Gutzwiller's comment, then added, "Just make your objection, no editorial comments. Overruled."

{¶65} But counsel repeatedly stood to make objections and argue the case, despite the judge's repeated warnings to stay seated and just make the objection without arguing. They often didn't even say "objection," but instead launched into an argument in the middle of the prosecution's examination.

{¶66} We understand the trial court's lack of patience with trial counsel. They made the case unnecessarily difficult.

{¶67} The control of the proceedings during a criminal trial rests with the trial court.[23] And a trial court must remain impartial and refrain from comments and behavior that might influence the jury.[24]

{¶68} Here, most of the trial court's condescending comments occurred at sidebar or outside the presence of the jury. And those

---

[23] See R.C. 2945.03.

[24] *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 256 N.E.2d 613.

comments that were in front of the jury were caused by George's trial counsel's refusal to obey the trial court's prior warnings. But we note that the trial court could have conducted itself with a stronger sense of decorum and exercised greater restraint when dealing with George's trial counsel.

{¶69} The trial court told George's mother, who is legally blind, that it would hold her in contempt for her comments from the audience. This was highly unusual and unnecessarily confrontational, but George's mother admitted to talking during the proceedings. And we cannot say that the remarks demonstrated any prejudice on the part of the trial court.

{¶70} The trial court instructed the jury not to make any inferences from the rulings, statements, or facial expressions of the trial court. This case had obviously tried the trial court's patience, but at no time was there any evidence that the trial court was doing anything but its duty to uphold the law and to conduct the proceedings in an unbiased manner.

{¶71} Accordingly, we dismiss the third count of the indictment, reverse the trial court's judgment, and remand for a new trial.

Judgment accordingly.

WINKLER, P.J., concurs.

HILDEBRANDT, J., concurs in part and dissents in part.

HILDEBRANDT, J., concurring in part and dissenting in part.

{¶72} Because I believe that George has failed to demonstrate that the trial court abused its discretion in denying a continuance, I respectfully dissent in part. First, as is conceded in the lead opinion, there is nothing in the record to indicate what documents or other materials had been seized in the December 2002 search. The mere allegation that "numerous legal documents relating to this case were seized" was certainly not sufficient to demonstrate either that those materials implicated the attorney-client privilege or that they were material to George's defense. George's-and his attorneys'-inability to describe the material in any greater detail would seem to belie their significance.

{¶73} Moreover, the record does not indicate that George's counsel were prevented from retrieving the contested material. The lead opinion accepts without question counsel's explanation that counsel did not accept the material when it was offered because "they did not want to be part of the chain of custody." If the defense attorneys were asserting that the material should never have been seized, it is inconceivable why they would treat the materials as if they were in some manner tainted or why they would otherwise decline the offer to have the materials returned. Finally, in an age of digital storage and retrieval, George's suggestion that the

materials could not be retrieved and reproduced seems disingenuous.

{¶74} In any event, on the state of the record before us, it cannot be said that the trial court's refusal to grant a continuance on the basis of the contested material was unreasonable. Although I concur in the result that was reached in the remainder of the majority opinion, I would reject George's argument as it relates to the request for a continuance. Therefore, I respectfully dissent as to that part of the decision.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.